

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CLIFTON DAY,

Plaintiff,

Case No. 05-CV-71311

vs.

HONORABLE DENISE PAGE HOOD
HONORABLE STEVEN D. PEPE

BENCY MATHAI, ET AL

Defendants.

/

ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND (#21)
AND HIS MOTION FOR APPOINTMENT OF COUNSEL (#41)
AND GRANTING DEFENDANTS' MOTIONS STAYING DISCOVERY (# 28 & 40)

Plaintiff, an inmate in the custody of the Michigan Department of Corrections ("MDOC"), filed this action under 42 U.S.C. §1983, alleging that defendants violated his constitutional rights. On June 13, 2005, plaintiff filed his Motion For Enlargement Of Time and his Rule 15 Application For Leave To Amend (# 21). On July 21, 2005, Defendants MDOC and Debbie Roth (Roth) filed their Motion For Protective Order Staying Discovery (#28). On August 12, 2005, Defendant Correctional Medical Services, Inc., filed a Motion for Protective Order Staying Discovery under FRCP 26(c) until a ruling on its dispositive motions (# 40). On August 18, 2005, Plaintiff filed a Motion for Appointment of Counsel (#41).

These motions were referred to the undersigned for hearing and determination pursuant to 28 U.S.C. §636(b)(1)(A). For the following reasons, Plaintiff's motions are DENIED and Defendants' motions are GRANTED.

While a plaintiff usually has the right to amend the complaint once before the filing of a responsive pleading without seeking permission from the court (Fed. R. Civ. P. 15(a)),¹ a plaintiff in a case covered by the Prison Litigation Reform Act may not amend the complaint in order to avoid a *sua sponte* dismissal (*Baxter v. Rose*, 305 F.3d 486, 489 (6th Cir. 2002)) and a court need not grant leave to amend where amendment would be futile (*Miller v. Calhoun County*, 408 F.3d 803, 817 (6th Cir. 2005)). Therefore, because this Court believes that the present case is subject to dismissal, as more fully explained in the undersigned's Report and Recommendation, Plaintiff's Rule 15 Application For Leave To Amend (#21) is DENIED.

In his Motion For Enlargement of Time Plaintiff requested additional time in which to respond to the motions to dismiss filed by defendants MDOC; Correctional Medical Services, Inc. (CMS) and Roth. Plaintiff's Motion For Enlargement Of Time (#21) is DENIED AS MOOT, because Plaintiff filed a response to Defendants' motions to dismiss on August 1, 2005 (#31).

As stated above, this Court has issued a recommendation that this case be dismissed, therefore, Defendants MDOC's and Roth's and Correctional Medical Services, Inc.'s Motions For Protective Order Staying Discovery (# 28 & #40) are GRANTED. Discovery shall be stayed pending further order of this Court.

SO ORDERED.

Dated: August 24, 2005
Ann Arbor, Michigan

s/Steven D. Pepe
United States Magistrate Judge

¹ While Defendants have filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b), this does not constitute a responsive pleading. *Knecht v. Ohio Adult Parole Authority*, 215 F.3d 1326 (Table), 2000 WL 659030, *4 (6th Cir. 2000); C. Wright, A. Miller, & M. K. Kane, 6 *Federal Practice and Procedure* § 1483, at 585-87 (2d ed. 1990).

Certificate of Service

I hereby certify that copies of this Order were served upon the plaintiff and attorneys of record by electronic means or U. S. Mail on August 24, 2005.

s/William J. Barkholz
Courtroom Deputy Clerk